BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Interconnection and Resale	)	CC Docket 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

CTIA commends the Commission's efforts in the Second Notice to ensure that competition, and not regulation, will shape the further development of the CMRS marketplace. As the mobile services market is competitive, the necessary prerequisite for government intervention, i.e., persistent substantial market power, is lacking. For this reason, the forward-looking regulatory approach reflected in the Second Notice with respect to direct CMRS interconnection and resale obligations issues will foster the continued advancement of this burgeoning, dynamic industry.

Specifically, CTIA concurs with the Commission's tentative conclusions to:

- refrain from imposing a general interstate interconnection obligation on CMRS providers;
- refrain from imposing further regulatory requirements upon CMRS roaming services;
- extend the current cellular resale obligations to all CMRS providers; and
- reject proposals to impose a reseller switch requirement upon CMRS providers.

By such limited regulatory action, the Commission will foster competition. It also will avoid the introduction of uneconomic costs by imposing only those regulations upon CMRS providers necessary to assure efficient outcomes and thus maximize consumer welfare.

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The Cellular Telecommunications Industry Association ("CTIA")[1], by its attorneys, submits its Comments in the above-captioned proceeding.[2]

INTRODUCTION

The Commission's Second Notice, which considers the efficacy of imposing general interconnection and resale obligations upon commercial mobile radio service ("CMRS") providers, proposes, in large, to refrain from drastic regulatory measures in favor of reliance upon competitive market forces. CTIA applauds the forward-looking policy direction reflected in such proposals and encourages the Commission to continue its efforts to foster the

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[1] CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular services to the United States, Canada, and Mexico; PCS providers; and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

[2] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Notice of Proposed Rule Making in CC Docket 94-54, FCC 95-149 (rel. April 20, 1995) ("Second Notice").

development of a competitive, efficient mobile services marketplace.[3]

CTIA's comments, which are based upon earlier submissions presented during the Notice of Inquiry stage,[4] support Commission proposals favoring marketplace solutions over regulatory mandate. The principle motivating Commission action in this case should be that government intervention is warranted only by the existence of persistent, substantial market power and control over essential facilities. As the CMRS market is competitive and dynamic, and characterized by new entry and new PCS spectrum allocations that more than double the existing cellular allocation, the prerequisite showing cannot be made, thereby negating the need for Commission intervention.

Specifically, in adopting rules governing CMRS interconnection and resale, the Commission should: (1) refrain

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[3] This same approach is reflected in the Commission's recent efforts to conform the CMRS technical and operational rules. Regulatory Treatment of Mobile Services, Third Report and Order in GN Docket 93-252, 9 FCC Rcd 7988, 8002 (1994) ("CMRS Third Report") ("Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment . . . consistent with that objective, the Commission's role is to establish an appropriate level of regulation for the administration of CMRS. Such a regulatory regime will ensure that the marketplace -- and not the regulatory arena -- shapes the development and delivery of mobile services to meet the demands and needs of consumers, except where relying on market forces might lead to a result that is harmful to competition or to consumers." (emphasis added).

[4] See Comments of the Cellular Telecommunications Industry Association in CC Docket 94-54 (September 12, 1994) ("Initial Comments"); Reply Comments of the Cellular Telecommunications Industry Association in CC Docket 94-54 (October 13, 1994) ("Initial Reply").

from imposing a general interstate interconnection obligation on CMRS providers, (2) refrain from imposing further regulatory requirements upon CMRS roaming services, (3) extend the current cellular resale obligations to all CMRS providers, and (4) reject proposals to impose a reseller switch requirement upon CMRS providers. By such actions, the Commission will promote consumer welfare generally by permitting the freer play of market forces absent unnecessary, burdensome regulatory constraints.

I. THE COMMISSION SHOULD REFRAIN FROM IMPOSING A GENERAL INTERSTATE INTERCONNECTION OBLIGATION ON CMRS PROVIDERS.

A. Direct CMRS interconnection requirements are unwarranted as CMRS providers lack the prerequisite market power.

The Second Notice tentatively concludes "that it is premature, at this stage in the development of the CMRS industry, for the Commission to impose a general interstate interconnection obligation on all CMRS providers."[5] CTIA concurs with the Commission's conclusion as well as its rationale.

As the Commission correctly notes, "market conditions [do not] indicate that it is necessary to impose a general interstate interconnection obligation at this time,"[6] especially considering

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[5] Second Notice at ¶ 29.

[6] Id. at ¶ 31. In fact, the Commission has consistently taken a forward-looking approach to regulating CMRS which recognizes the present competitive nature of the CMRS market and the wealth of new services poised for entry. See, e.g., Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd 1411, 1418-1422 (1994) (Declining to impose tariff requirements on CMRS providers, the FCC found that "[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates.") ("CMRS (continued...)

that CMRS "interconnection is already available through LEC facilities."[7] Moreover, "the CMRS industry is undergoing rapid change in terms of technologies and facilities employed," thereby rendering interconnection proposals speculative.[8]

It is well-settled that absent persistent, substantial market power, the costs associated with mandated interconnection clearly outweigh any presently discernible benefits.[9] As the CMRS marketplace is competitive,[10] with cellular, SMR and paging

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[6](...continued)
Second Report"); CMRS Third Report, 9 FCC Rcd at 7996-7997, 8010 (For purposes of conforming CMRS technical and operational rules, the FCC chose "to take an expansive view of the present condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered to be substantially similar.")

[7] Second Notice at ¶ 31.

[8] Id. at ¶ 29.

[9] See CTIA Initial Comments at 15-17, 25-34 (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Northwest Wholesale Stationers v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985) (a concerted refusal to deal is not illegal in absence of market power); Areeda & Hovenkamp, Antitrust Law, ¶ 736.2d (1993 Supp.)(a duty to deal with a competitor should only be imposed on a firm (or group of firms) that has a monopoly in the downstream market)); CTIA Initial Reply Comments at 12-15. See infra for a discussion of market power and relevant markets.

[10] Commission declarations, the MFJ court's conclusions, and economic analyses, all support a finding that the CMRS market is competitive. See, e.g., CMRS Second Report, 9 FCC Rcd at 1478 ("there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings;" "cellular providers do face some competition today, and the strength of competition will increase [in] the near future"); Applications For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5862 (1994)("the BOCs' (continued...)

services currently offered and the advent of PCS services in the very near future,[11] concerns regarding a firm's ability to

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[10](...continued)
historical, ubiquitous wireline exchange bottleneck [is not] perfectly analogous to the local cellular service market. Cellular service is relatively new, still serving only a small percentage of the population. Moreover, the existence of two facilities-based carriers has created a degree of rivalry not present in 'wireline' exchange services under the former Bell System, and competition from other wireless systems, such as PCS, is on its way"); United States v. Western Electric Co., Inc., No. 82-0192, slip op. (D.D.C. Aug. 25, 1994) (non-BOC cellular systems and BOC-affiliated cellular systems outside their local exchange regions "do not constitute bottleneck monopolies"); Stanley M. Besen, Robert J. Larner and Jane Murdoch, "An Economic Analysis of Entry By Cellular Operators Into Personal Communications Services," submitted as an Appendix to CTIA's Comments in Gen. Docket 90-314 (Nov. 1992); Stanley M. Besen, Robert J. Larner and Jane Murdoch, "The Cellular Service Industry: Performance and Competition," submitted as an Appendix to CTIA's Comments in Gen. Docket 90-314 (Jan. 1993); Affidavit of Jerry A. Hausman, United States v. Western Elec. Co., Civil Action 82-0192 (June 15, 1994); Robert F. Roche, "Competition and the Wireless Industry," submitted as an Appendix to CTIA's Opposition in PR Dockets 94-103 - 94-110 (Sept. 1994).

[11] The Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992) ("DOJ Guidelines") recognize that, under certain conditions, entry by new firms into a market can counteract concerns over the exercise or potential exercise of undue market power. § 3 (Entry Analysis). Committed entry (i.e., entry by new competitors that requires the expenditure of significant sunk costs of entry and exit) is considered timely, and hence relevant to market power analysis, if it "can be achieved within two years from initial planning to significant market impact." § 3.2 (Timeliness of Entry).

The $ 7.7 billion dollars committed for the broadband PCS licenses in the A and B block and the impending entry of these broadband PCS licensees within the coming months, see, e.g., Tim Greene and Joanie Wexler, Pacific Bell Chooses Ericsson for Wireless, Network World, May 29, 1995 at 25 (Pacific Bell PCS network scheduled to be finished by year-end 1996 and rollout of service the beginning of 1997); APC Receives Patent on Device That Will Allow Spectrum Sharing, Advanced Wireless Communications, May 24, 1995 (American Personal Communications is scheduled to offer PCS service by late 1995) adds to the already competitive CMRS market.

exercise the prerequisite market power or to retain control over essential facilities are rendered insignificant. For these reasons, consumer demand and business necessity,[12] not regulation,[13] will dictate the extent of and need for interconnection.

All regulatory intervention imposes costs; costs which can only be justified in situations where the benefits are clearly overriding. In this case, unnecessary regulation carries the potential to undercut the competitive process resulting in

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[12] The Commission already recognizes that CMRS providers lack persistent, sustained market power or control over essential bottleneck facilities. CMRS Second Report, 9 FCC Rcd at 1499. Moreover, historically, the Commission has generally ordered interconnection only in those instances where it perceived market failure. See, e.g., Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs, 7 FCC Rcd 7369, 7373 (1992) ("LECs' current special access tariffs make it economically infeasible for customers to combine their own or competitive access provider facilities with portions of the LEC network to satisfy their . . . access needs.")

[13] In the sole case where the Commission mandated interconnection among carriers lacking market power, the circumstances are readily distinguishable. See Interface of the International Telex Service With The Domestic Telex and TWX Services, Docket No. 21005, 76 FCC 2d 61 (1980) ("Telex Order"). Western Union was the sole provider of telex service in the U.S. It also provided subscriber access overseas via interconnection with international record carriers ("IRCs"). However, Western Union subscribers could not use their terminals to communicate with other telex users. And, due to regulatory constraints, IRC subscribers could not use their terminals to communicate with IRC or Western Union subscribers.

Direct CMRS interconnection does not present the same issues. Because CMRS providers, by definition, are interconnected with the PSTN, effective CMRS interconnection already exists. Moreover, the Telex Order noted that IRC-to-IRC interconnection was not "unduly difficult or expensive to accomplish." Id. at 74-75. By contrast, many CMRS networks are not yet designed, making mandated interconnection speculative.

inefficiency and diminished consumer welfare.[14] At present, CMRS providers cannot know their interconnection needs. Furthermore, as discussed below, because each type of CMRS has a unique network with potentially different service plans and technological requirements, the costs of direct interconnection may be prohibitive. Moreover, "free rider" problems may arise as a limited number of providers are required to bear and assume the risk of establishing new networks.[15] A compulsory interconnection scheme may actually reduce incentives to build out the very wireless networks crucial to the full development of the NII, thereby decreasing consumer choice.

The Commission is correct in noting that CMRS interconnection is currently available via the LEC. Because all CMRS providers invariably will be interconnected with a LEC[16] they, and their customers, will have access to all carrier

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[14] As CMRS networks may employ different technologies, significant costs will have to be expended to upgrade software and other equipment to achieve compatibility among the various networks.

[15] See Donald I. Baker, Compelling Access to Network Joint Ventures, Regulation, at 59-60 (1994). The Department of Justice has recognized in the context of automated clearinghouses that "the major difficulty with mandated sharing is that it undercuts in advance any incentive to innovate, creating a 'free-rider' problem with respect to initial risk-taking." Antitrust Div., U.S. Dept. of Justice, Policy Statement on Sharing for the Nat'l Commission on Electronic Funds Transfers 4 (Jan. 13, 1977), quoted in William Blumenthal, Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration, 58 Antitrust L.J. 855, 868 (1990).

[16] By definition, CMRS providers must be "interconnected with the public switched network," i.e., the LEC. 47 U.S.C. § 332(d)(1),(2) (defining "commercial mobile service" and "interconnected service").

networks. If and when it becomes more efficient to establish direct CMRS interconnection than to pay the LEC for transport and switching functions, the market will ensure such a result. For example, direct interconnection will naturally evolve in areas of high volume traffic as firms respond to tangible business needs for a direct link.[17] But in low volume areas, similar to traffic going to and from BOC access tandems, it will not be economically efficient to establish direct CMRS links.[18]

B. The market supports a finding that direct CMRS interconnection is unwarranted.

As the Commission correctly notes, "the CMRS provider's market share, and the definition of the relevant market, are important to the determination of the potential for [a carrier] profitably raising a rivals' costs."[19] CTIA submits that the

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[17] Direct connections can be provided through reliance upon point to point microwave or dedicated facilities obtained from LECs or CAPs. If any of these alternatives can be provided more efficiently than LEC interconnection, there are no barriers inhibiting reliance upon these alternatives.

[18] In international communications, the Commission recognized the utility of a flexible approach to indirect traffic routing through an intermediate, third country as a means to promote new competitive entry and as an efficient approach in situations where traffic flow is insufficient to warrant direct interconnection. Int'l Communications; Uniform Settlement Policy for Parallel Routes, 59 R.R. 2d 982 (1986); Implementation and Scope of Int'l Settlements Policy for Parallel Int'l Communications Routes, 2 FCC Rcd 1118 (1987).

[19] Second Notice at ¶ 33. As the Commission notes, "to have an anticompetitive incentive and ability to deny interconnection to a rival, a CMRS provider would have to be much larger than the rival (or at least carry more of the rival's terminating traffic than the rival carries of its terminating traffic); otherwise the denying carrier's own costs would be raised as much as the rival's by the lack of direct interconnection." Id. at ¶ 32.

relevant service and geographic market for purposes of this analysis centers around the local exchange. As demonstrated below, LECs are the sole service providers demonstrated to have market power with respect to direct interconnection, and as such, only they should be subject to direct interconnection requirements.

Substantial, persistent market power (or monopoly power) is defined generally as "'the power to control market prices or exclude competition.'"[20] To determine whether undue market power exists, it is necessary to define the relevant market in which the entity has the requisite ability.[21] The relevant antitrust market has two dimensions: a product (or service) market and a geographic market. The product market is composed of those "'products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered,'" i.e., products considered to be functional

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[20] ABA Antitrust Section, Antitrust Law Developments (Third) at 196 (1992) ("Antitrust Law Developments") (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("du Pont").

[21] The DOJ Guidelines define an antitrust market as "a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." See § 1.0 (Market Definition, Measurement and Concentration: Overview).

equivalents in the eyes of the consumer.[22] In turn, the geographic market is defined as the "geographic area in which sellers of the particular product or service operate, and to which purchasers can practicably turn for such products or services."[23]

The service addressed in this proceeding, of course, is the ability of an entity to terminate traffic.[24] CMRS providers must interconnect with carriers with the ability to terminate CMRS traffic so that the CMRS provider can offer its customers ubiquitous coverage.[25] While CMRS providers have the requisite

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[22] Antitrust Law Developments at 200 (quoting du Pont). See id. at 202-203 ("courts have traditionally given greatest emphasis to reasonable interchangeability of use (or cross-elasticity of demand" in defining the relevant product market.") Similarly, the DOJ Guidelines note that "[m]arket definition focuses solely on demand substitution factors, i.e., possible consumer responses." DOJ Guidelines at § 1.0.

[23] Antitrust Law Developments at 208.

[24] The Commission has long recognized that traffic termination constitutes separate economic activity. See WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order in CC Docket 86-1, 59 R.R. 2d 1418, 1443-1445 (1986); MTS and WATS Market Structure: Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Memorandum Opinion and Order on Reconsideration in CC Docket 78-72, 80-286, 6 FCC Rcd 547 (1991) (In determining access charges, the Commission originally required recovery of costs through equal charges for both originating and terminating traffic. In an effort to protect against "uneconomic" bypass on the origination side, the Commission subsequently shifted more costs onto the terminating charge.)

[25] As CMRS providers, by definition, offer their services to the public or a substantial portion thereof, 47 U.S.C. § 332(d)(1), ubiquitous coverage would appear to be the general goal. In most cases, the value of a CMRS provider's services to the subscriber is a function of the ubiquity of its network. See Michael L. Katz and Carl Shapiro, Network Externalities,

(continued...)

ability to terminate traffic to their customers (i.e., 10% penetration) in their service areas, the LEC is the only entity with the ability and sufficient capacity to reach all customers (i.e., 90+% penetration) within a given area.[26]

Therefore, as interconnection is crucial for ubiquitous coverage, and the LEC is the sole entity with the current ability to provide ubiquity, it follows that the LEC should be the only entity subject to direct interconnection requirements. Stated negatively, only the LEC's refusal to deal would preclude the completion of any significant calling volume. It would be economically irrational for any local distribution player except the LEC to decline to deliver traffic originated on another network.

At this stage in the development of the mobile services market, CMRS networks simply do not constitute essential facilities, thereby rendering government compelled direct interconnection unnecessary and unwarranted. Moreover, as the

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[25](...continued)
Competition, and Compatibility, 75 Amer. Econ. Rev. 424 (1985) ("There are many products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.")

In niche CMRS services, it is possible that more targeted coverage is desired. Even if a CMRS provider served the targeted consumer base, the LEC would as well, thus decreasing the necessity of direct CMRS interconnection. Direct interconnection would develop in this case if mutually beneficial.

[26] By this analysis, direct CMRS interconnection may be desirable to the CMRS provider in areas of high-volume traffic or if it valued redundancy. As explained infra, direct CMRS interconnection, as needed, can be achieved more efficiently through private negotiations than regulatory fiat.

CMRS market grows, CMRS networks will not constitute essential facilities because of the presence of alternatives such as other CMRS providers, the LEC and other alternative access providers (such as CAPs).

In assessing the geographic market, CTIA submits that the LEC service area is controlling. Government regulation, through entry and other restrictions, can define the relevant geographic market.[27] The local exchange constitutes the geographic market with respect to direct interconnection as this is the area in which a LEC has the requisite ability to deny direct interconnection.

In sum, an assessment of the relevant product and geographic markets demonstrates that a direct CMRS interconnection obligation is not warranted by market power concerns.

Moreover, CTIA submits that the Commission's proposed reliance upon LEC investment in, and affiliation with, a party denying interconnection as an important factor in assessing anticompetitive conduct[28] is misplaced. Rather, the proper approach lies in assessing whether the relevant market is

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[27] Phillip E. Areeda, Herbert Hovenkamp and John L. Solow, Antitrust Law: An Analysis of Antitrust Principles and Their Application, at 216, note 10, 290-292 (Vol. IIA 1995) ("The government can create or protect market power by limiting entry. The most extreme limitation gives a single firm a monopoly in a defined service area, as with a local electric utility, local telephone exchange. . ."); id. at 291, note 5 (government entry restrictions designed to protect wasteful overcapacity, "can impair consumer welfare more than the market failure.")

[28] See Second Notice at ¶¶ 43-44.

competitive, i.e., whether there are market alternatives to the LEC such as competitive access providers ("CAPs") or point-to-point microwave operators in the relevant market.[29]

In response to the Commission's request for comment on whether it should consider factors other than market power in assessing whether to impose general interconnection obligations,[30] CTIA submits that the Commission satisfies its Title II obligations through sole reliance upon market power. An assessment of the existence of persistent, substantial market power will conclusively determine whether regulatory intervention is necessary to protect the competitive process and maintain consumer welfare. Simply put, without market power or control over essential facilities, CMRS providers lack the necessary ability to unjustly discriminate or otherwise act anti-competitively. For this reason, beyond the prefatory showing, efficiency concerns counsel against further inquiry.

C. Technological constraints currently render CMRS direct interconnection proposals speculative.

In addition to competitive and efficiency concerns, as a practical matter, it is impossible to presently articulate specific interconnection requirements for CMRS networks because

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[29] See United States v. Western Electric Company, Inc., No. 82-0192, opinion at 13, order at 3 (D.D.C. April 28, 1995) (RBOC wireless systems provided generic wireless MFJ waiver conditioned upon, among other things, a demonstration that: (1) CAPs are providing alternative access in a given area, and (2) there are no state legal or regulatory barriers against the provision of such CAP services within that area).

[30] Second Notice at ¶¶ 41-42.

most such networks have yet to be designed. Mobile services technology is in a constant state of flux such that claims in support of the feasibility of direct CMRS interconnection are rendered speculative.

For example, currently GSM based PCS switches are not compatible with cellular switches using IS-41 signalling system protocol. To ensure seamless roaming and handoff capabilities, such interconnection is imperative. At this point, even with the best protocol converter, there are varying degrees of incompatibility as equivalent IS-41 and GSM features must be individually "mapped" out, a very costly engineering proposition. As a further complication, most GSM switches are currently manufactured in Europe and designed to use the ITU version of the American National Standard Institute North American Signalling System 7 ("SS-7"), i.e., C-7. Because the GSM switch is not compatible with SS-7, it must be converted to operate on SS-7/IS-41 networks. Moreover, a compatible PCS/cellular standard interface has not been established for billing purposes. Privacy standards and encryption techniques also must be incorporated for all common air interfaces to ensure interoperability between various PCS networks. Finally, the need for a standard format to ensure E911/911 emergency access must still be adopted.[31]

In light of these technical impracticalities, the Commission runs the risk of favoring specific technologies by adopting

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[31] CTIA notes that efforts are currently underway to establish an E911/911 standard format for all CMRS providers.

interconnection requirements at this stage. As a matter of policy, the Commission should eschew any regulatory action that may effectively dictate the ultimate evolution of CMRS services.

D. The Section 208 complaint process is sufficient to remedy any limited instances where interconnection is necessary to further social welfare.

CTIA concurs with the Commission's reliance upon the Section 208 complaint process in instances where voluntary activities arguably have led to or reflect market failure.[32] The Section 208 complaint process can sufficiently protect CMRS providers should occasions arise in which other CMRS providers engage in statutorily unreasonable practices.[33] Thus, any aggrieved CMRS provider may file a formal complaint under Section 208 of the Communications Act with the Commission. Through this process, the Commission can ensure that CMRS providers obtain timely and appropriate redress where warranted.[34]

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[32] Second Notice at ¶¶ 38-40.

[33] 47 U.S.C. § 208. The Commission's confidence in the Section 208 complaint process generally is reflected in the CMRS Second Report, where the Commission concluded, in the context of forbearing from rate and other regulation under Title II, that "the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act." CMRS Second Report, 9 FCC Rcd at 1479.

[34] Moreover, CMRS providers are liable for monetary damages under Sections 206, 207 and 209 of the Communications Act, 47 U.S.C. §§ 206, 207 and 209, to any CMRS provider aggrieved by a violation of the Communications Act. See CMRS Second Report 9 FCC Rcd at 1479 ("we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages" in the event of Section 201 violations). Such potential liability should provide sufficient incentive for direct CMRS interconnection agreements where warranted.

In light of the evolving, competitive nature of CMRS, and the fact that Section 208 can adequately compensate for market failures, reliance upon a notice and comment rule making proceeding as a means to police against allegations of § 201(a) violations is unwarranted.[35] Hypothetical concerns over CMRS provider misconduct are simply too speculative to warrant a rule making proceeding with its attendant costs and associated delays.

E. In reliance upon Section 2(b) of the Act, the Commission should preempt state-imposed interconnection obligations.

In response to the Commission's request for comment upon whether state-imposed interconnection obligations should be preempted,[36] CTIA submits that, regardless of the Commission's ultimate decision with respect to direct CMRS interconnection obligations, traditional Section 2(b)[37] analysis would support federal preemption of contrary state and local regulations.

While Title II generally creates a dual regulatory scheme with respect to telecommunications services,[38] the Commission possesses authority to preempt state regulation to prevent the

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[35] See Second Notice at ¶ 40 (Commission proposal to initiate a notice and comment rule making proceeding).

[36] Second Notice at ¶ 44.

[37] 47 U.S.C. § 152(b).

[38] Specifically, section 1, 47 U.S.C. § 151, grants the Commission jurisdiction over interstate telecommunications matters. The Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

negation of legitimate national policy objectives. This authority requires that necessarily inconsistent state and local requirements yield.

Louisiana Public Service Commission v. FCC,[39] as confirmed by subsequent lower court opinions, provides the Commission with the requisite ability to preempt state and local regulation of direct CMRS interconnection. In overturning the Commission's decision to preempt the states' ability to prescribe depreciation rates, the Louisiana Court found section 2(b) to be a "substantive jurisdictional limitation on the FCC's power."[40]

The Louisiana Court, though, qualified its holding by recognizing that in certain situations it would not be possible to separate out the interstate and intrastate components of the Commission's regulation and therefore federal preemption would be warranted.[41] Consistent with Louisiana, the lower courts have recognized an exception to § 2(b), permitting Commission preemption when the states' exercise of authority unavoidably would negate the legitimate exercise of the Commission's own

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[39] 476 U.S. 355 (1986).

[40] Id. at 373.

[41] Id. at 375, note 4 (citing with approval North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1976), cert. denied, 434 U.S. 874 (1977)(FCC was within its authority to allow subscribers to provide their own telephones and to preempt state regulation which prohibited connection of such phones under impossibility theory).

interstate authority. This "impossibility" exception applies here.[42]

In accordance with Louisiana, contrary state and local regulations must yield. In the case of cellular, the Commission (cognizant of Louisiana principles) found that, as a jurisdictional matter, "the physical plant used in interconnection of cellular carriers to landline carriers is within our plenary jurisdiction because the identical plant serves both intrastate and interstate cellular services."[43] The

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[42] While it remains unclear whether a physical impossibility must exist to permit application of the exception, in this case, physical impossibility arises. See Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) (FCC's preemption of PUC's order which prohibited LEC from providing private microwave owner with additional interconnections to the PSTN upheld as private network incapable of separating interstate and intrastate calls); Pub. Service Comm'n of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990) (FCC's preemption of states' authority to regulate rates that LECs charge to IXCs to disconnect telephone service for nonpayment of the interstate bill upheld as separation of interstate and intrastate access impossible); but see California v. FCC, 39 F.3d 919 (9th Cir. 1994) cert. denied, 115 S.Ct. 1427 (On review of remand, FCC's limited preemption of state structural separation requirements for jurisdictionally-mixed enhanced services, and of CPNI and network disclosure rules, upheld because narrowly tailored to impossibility exception); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989) (FCC's preemption of states' Centrex marketing regulations (including structural separation requirements) upheld because interstate and intrastate components of the FCC's regulation could not be separated); See generally Jonathan J. Nadler, Give Peace A Chance: FCC-State Relations After California III, 47 Fed. Com. L.J. 457 (April 1995) (FCC preemption is permissible when it is physically impossible to separate interstate and intrastate components of a given facility, thereby making it impossible for divergent federal and state regulations to co-exist, i.e., inseverability).

[43] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, Report No. CL-379, 2 FCC Rcd 2910, 2912 (1987) ("the Commission (continued...)

same rationale applies with equal force for all CMRS services as the physical plant is inseverable, and for this reason preemption of contrary state and local regulation would be warranted.[44]

II. THE COMMISSION SHOULD REFRAIN FROM TAKING FURTHER REGULATORY ACTION REGARDING ROAMING SERVICES.

A. Current roaming standards foster competition and efficiency for all CMRS providers.

CTIA concurs with the Commission's tentative conclusion that no regulatory action with respect to roaming services is required at this time.[45] The same rationale underlying CTIA's objection to compulsory interconnection requirements applies here as well. In the absence of persistent, substantial market power, producers' pursuit of economic efficiency, not government intervention, should determine the need for and extent of CMRS roaming.

The current requirements under Section 22.901 of the Commission's rules,[46] are sufficiently broad to foster PCS

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[43](...continued)
has plenary jurisdiction, based upon Section 2(a) and 201 of the Act, over the physical plant used in the interconnection of cellular carriers. Section 201 provides the Commission with express authority over 'physical connections with other carriers.' Cellular physical plant is inseparable and thus Section 2(b) does not limit our jurisdiction in this area").

[44] For the same reasons, preemption of inseverable, inconsistent state policies with respect to reseller switch proposals would also be warranted. See infra section IV.

[45] Second Notice at ¶ 56.

[46] 47 C.F.R. § 22.901. Section 22.901 states, in part, that "[c]ellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers, while such subscribers are (continued...)

roaming services without imposing undue costs upon the CMRS industry. Cellular carriers will serve PCS subscribers under current rules assuming the requisite connections and contractual arrangements between carriers are in place.[47] Service will occur in either of two ways. First, a PCS subscriber using a dual-band phone will appear on a cellular system as a cellular customer when the dual-mode PCS phone switches to its cellular mode. Thus, the cellular service rules would apply, requiring cellular carriers to provide service to roamer customers. Second, in the unlikely event that a cellular carrier would attempt to deny roaming service to a PCS subscriber using a dual-band phone, nothing would prevent the PCS carrier from programming the dual-band phone with a valid cellular system I.D.,[48] and then the cellular system would be unable to distinguish whether it was providing service to a PCS subscriber or a cellular subscriber, thereby allaying potential discrimination concerns.

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[46](...continued)
located within any portion of the authorized cellular geographic service area . . . where facilities have been constructed and service to subscribers has commenced."

[47] The Second Notice contains the Commission's recitation of industry representations regarding Section 22.901's applicability to PCS subscriber roaming in cellular service areas. See Second Notice at ¶ 57. Upon examination of the Commission's recitation, it appears that clarification is necessary.

[48] A PCS provider could obtain valid cellular system I.D.s either from a cellular market licensed to the PCS licensee, or by resale agreement.

B. An examination of the recent winners of the A and B block broadband PCS auctions further demonstrates that no additional mandatory roaming obligations are necessary.

In addition to the above analysis, an examination of the winning bidders of the A and B block broadband PCS auctions counsels against the need for further regulatory involvement. Even the most cursory review of the winning PCS bidders demonstrates that current cellular providers will also be providing PCS services.[49]

The cellular experience conclusively demonstrates that private negotiations are sufficient to ensure ubiquitous roaming service. Moreover, as consumer demand for roaming service is high, good business judgment counsels in favor of making such agreements. As the majority of the current A and B block auction winners are familiar with and satisfied with private negotiations, regulatory intervention is unwarranted.

C. The current system of private negotiations for roaming services already serves to protect CMRS customers from anti-competitive behavior.

Moreover, the flexibility of Rule 22.901 will also protect CMRS customers against fraudulent conduct. Additional regulation would be superfluous as the current regime already has the necessary mechanisms in place to protect the public interest.

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[49] See FCC Public Notice, "Commercial Mobile Radio Services Information: Announcing the Winning Bidders in the FCC's Auction of 99 Licenses to Provide Broadband PCS in Major Trading Areas; Down Payment Due March 20, 1995" (rel. March 13, 1995).